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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

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| STATE OF ARIZONA,<br><br>Plaintiff,<br>vs.<br><br>JAMES ARTHUR RAY,<br><br>Defendant. | CASE NO. V1300CR201080049<br><br>Hon. Warren Darrow<br><br>DIVISION PTB<br><br>**DEFENDANT JAMES ARTHUR RAY'S REQUEST FOR CURATIVE INSTRUCTION REGARDING STATE'S BURDEN OF PROOF** |

On April 28, the State asked a witness, Detective Diskin, a series of questions regarding whether and when the Defense provided information to the State regarding the possibility of organophosphate poisoning in this case. The Defense objected and requested a limiting instruction. The Court expressed "concerns" about "burden-shifting," and specifically about "the implication that the defense somehow has to tell the State what might be important," the implication that "the defense somehow has to explain when they might have thought of" information, and implications about "what they should do in an interview." Draft Trial

Transcript, 4/28/11, at 182:4–8, 184:14–25, 187:1–11. The Defense seeks a limiting instruction, set out below, to be given before Detective Diskin's testimony proceeds.

As an initial matter, "[i]t is axiomatic that a criminal defendant is *always* free to challenge the sufficiency of the evidence with respect to an element or issue upon which the State bears the burden of proof, even without any advance notice of intent to do so. A defendant need not provide the prosecutor or the court with a preview of his case or his arguments, nor need he provide the prosecutor advance notice of the weaknesses in the State's case or identify evidence that the State should present to sustain its burden of proof." *State v. Marshall*, 197 Ariz. 496, 501 (App. 2000). That basic principle distinguishes the State's line of questioning in this case from that in *McDougall v. Corcoran*, 153 Ariz. 157 (1987), upon which the State relied in oral argument. In *McDougall*, the Defense was provided a breath sample, but did not introduce at trial the results of his testing. The court held that the State was permitted to "comment upon the defense's failure to adduce potentially exculpatory evidence to which defendant had access when defendant is attacking the accuracy of the State's evidence." *Id.* at 153 Ariz. at 160. Here, in contrast, the defense has not failed to adduce exculpatory evidence at trial, and did not have access to the blood samples that could have provided evidence of organophosphate poisoning.

In any event, where a prosecutor's questions or comments have improperly suggested a shift of the burden of proof, courts in Arizona and elsewhere have provided contemporaneous curative instructions. Such an instruction was given even in *McDougall*, where the line of questioning was ultimately held to be permissible. The prosecutor's rebuttal closing argument stated that the defendant "chose not to give that information to you," and that "the State should not be held accountable for what the defendant chooses not to put forth to you people." *Id.* at 159. The Supreme Court reported that at that point: "Defense counsel moved for a mistrial. The trial court denied the motion an *instructed the jury that the defendant is not required to produce any evidence or to prove his innocence.*" *Id.* (emphasis added). As the Supreme Court explained, "[t]o the extent the prosecutor's statement in rebuttal closing argument may have implied that defendant had the burden of proof, . . . the trial court's cautionary instruction to the jury was sufficient to cure any harm." *Id.* at 160.

Additional case law confirms that a contemporaneous jury instruction is "the better practice." *United States v. Cudlitz*, 72 F.3d 992, 1002 (1st Cir. 1996) ("the 'better practice' is to give a cautionary instruction at the time," because [w]hatever one's' faith in the capacity of general instructions to offset harmful evidence, the chance that the instruction will do any good is enhanced by offering the caution while the jury has immediately before it the question or evidence it is being told to disregard or limit."). This is particularly true in the case of comments or questions that implicate a constitutional issue as fundamental as the burden of proof. *See, e.g.*, *United States v. Sanchez-Śantana*, 356 Fed.Appx. 309, 311 (11th Cir. 2009) ("[T]he district court *gave a contemporaneous instruction* to the jury that the defense had no burden in this case to prove anything or to disprove anything at all." (emphasis added)); *United States v. Muscarella*, 585 F.2d 242, 251 (7th Cir. 1978) ("Defendants' critical contention . . . is that the government was attempting to shift the burden of producing evidence. To the extent that the prosecutor's argument can be interpreted as doing so, the government was in error. However, we note that in the present instance the defense counsel *immediately* objected and the court instructed the jury that any such suggestion by the government was incorrect. The court *again* at the close of the case instructed the jury as to the allocation of the burden of proof, repeating that the defendants had neither the burden of proving their innocence nor of producing any evidence. We conclude that the *trial judge's contemporaneous, proper statement of the law eliminated any possible prejudice* caused by the prosecutor's improper comment." (emphasis added)).

Accordingly, the Defense respectfully requests the following instruction be given at the beginning of trial proceedings on April 29:

> Ladies and Gentlemen, "a criminal defendant is *always* free to challenge the sufficiency of the evidence with respect to an element or issue upon which the State bears the burden of proof, even without any advance notice of intent to do so. A defendant need not provide the prosecutor or the court with a preview of his case or his arguments, nor need he provide the

prosecutor advance notice of the weaknesses in the State's case or identify evidence that the State should present to sustain its burden of proof."[1]

You heard testimony yesterday regarding when and how the Detective learned about information related to possible organophosphate poisoning. In considering this information, you must remember that the prosecution has the burden to prove all elements of the charged crimes beyond a reasonable doubt. As part of its burden, "[t]he State must prove beyond a reasonable doubt that a superseding intervening event did not cause the deaths."[2] Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. The burden of proof never shifts to Mr. Ray, the defendant. Mr. Ray is not required to produce any evidence at all.

DATED: April 29, 2011

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Copy of the foregoing delivered this 29 day of April, 2011, to:

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by _____

[1] This sentence is taken directly from *Marshall*, 197 Ariz. 496, 501 (App. 2000).

[2] This sentence is taken directly from RAJI (Criminal) 2.03.